In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 608

LUCILLE E. MORAN, PETITIONER

v.

HARRY D. PENAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR RESPONDENTS, DUFF, McKEON, GOFSTEIN, AND LUISE IN OPPOSITION

1. On November 7, 1959, petitioner, an Army veteran, was admitted at the request of Dr. Salvatore Sannella to the Veterans' Administration Hospital at Bedford, Massachusetts, pursuant to Ann. Laws of Mass., c. 123, sec. 79.[1] Dr. Sannella believed that petitioner was in need of immediate care and treatment for mental derangement (R. 151). On November 16,

[1] Section 79 provides that the "superintendent or manager of any institution for the insane may, when requested by a physician * * * receive and care for in such institution as a patient, for a period not exceeding ten days, any person deemed by such superintendent or manager to be in need of immediate care and treatment because of mental derangement * * *."

791-285—65

1959, respondent Duff, the hospital's assistant registrar, executed an application for the commitment of petitioner to an institution for the mentally ill (R. 63). The application was then filed in the District Court of Central Middlesex, Concord, Massachusetts. On December 2, 1959, a certificate was executed and filed in that court which stated that petitioner was eligible for care and treatment by the Veterans' Administration and that hospital facilities were available at which she could be cared for and treated (R. 66, 67). Five days later, she was examined by two qualified physicians, who certified that she was mentally ill and recommended that she be committed to an institution (R. 67–69). Their certification was also filed in the District Court of Central Middlesex. A commitment hearing was then held in that court pursuant to Ann. Laws of Mass., c. 123, sec. 51, and thereafter the court ordered petitioner committed to the V.A. Hospital at Bedford, Massachusetts. She remained there until February 12, 1960, when she was released. Respondent Gofstein was an employee of the hospital during the period of her confinement.

While hospitalized at the Bedford institution, guardianship proceedings were instituted by petitioner's brothers in the Hampden County Probate Court (R. 58–60). Respondent McKeon, a physician at the V.A. hospital, signed a statement, which was filed in the probate court, stating that petitioner had been found to be mentally ill and was a patient at the hospital (R. 70, 71). A hearing was held by the probate court at which respondent Luise entered an appearance as counsel for the Veterans' Administra-

tion. On December 15, 1959, the probate court appointed a Springfield bank to be petitioner's guardian. Thereafter, upon the bank's demand, the V.A. hospital forwarded certain personal property of petitioner which was in its custody to the bank (R. 53–84).

On November 16, 1964, petitioner filed an action in federal district court (D. Mass., No. 64–825–W) in which she alleged that respondents Duff, McKeon, Gofstein and others had engaged in a conspiracy to deprive her of her civil rights, under color of law, in violation of 42 U.S.C. 1983 and 1985(3) (R. 20–55). She also alleged that Dr. McKeon had violated 37 U.S.C. (1958 ed.) 351–354. On November 27, 1964, she filed an action in the district court against respondent Luise and others, charging that they, too, had violated these statutes.[2] Upon respondents' motion to dismiss the various actions for failure to state a claim upon which relief could be granted, the district court dismissed petitioner's complaints (R. 159–160). The Court of Appeals for the First Circuit affirmed *per curiam*, stating that "[o]ur examination of the record discloses no error" by the district court (Pet. 18–19).[3]

2. The court of appeals correctly upheld the district court's determination that petitioner's complaints failed to state any claims upon which relief could be granted. 37 U.S.C. (1958 ed.) 351–354 provides that, when any person on the active or retired list of the armed

[2] Numerous other actions were instituted by petitioner against various individuals involved in the commitment and guardianship proceedings.

[3] A petition for rehearing was denied on June 28, 1965 (Pet. 22).

services is deemed by competent medical authority incapable of managing his own affairs, any payments due him can be made to such other person as the Secretary of the Army, Navy or Air Force may designate. Those sections do not provide that a civil damages action may be brought for the violation of any of their provisions.

Such an action may be brought against any person who, under color of any State or territorial law, deprives another of a right secured by the Constitution and laws of the United States (42 U.S.C. 1983), or who conspires with others to deny a person the equal protection of the laws (42 U.S.C. 1985(3)). However, to come within the latter statute a plaintiff must "allege facts amounting to intentional and purposeful discrimination" (*Norton* v. *McShane,* 332 F. 2d 855, 863 (C.A. 5), certiorari denied, 380 U.S. 981; see *Snowden* v. *Hughes,* 321 U.S. 1, 8–9; *Gundling* v. *Chicago,* 177 U.S. 183, 186; *Joyce* v. *Ferrazzi,* 323 F. 2d 931, 932–933 (C.A. 1)). Petitioner has alleged no such facts (R. 20–55, 89–97). As for 42 U.S.C. 1983, it is "plainly limited to acts done under color of some state or territorial law" and does not embrace the acts of federal officials. The respondents in whose behalf this memorandum is filed are federal officials.[4] *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949; see, also, *Wheeldin* v. *Wheeler,* 373 U.S. 647, 650, n. 2.

[4] *Monroe* v. *Pape,* 365 U.S. 167, and *Cooper* v. *Pate,* 378 U.S. 546, on which petitioner relies (Pet. 10), involved State, not, as here, Federal, officials.

Accordingly, there is no warrant for further review by this Court, and the petition for certiorai should (at least as to the respondents in whose behalf this memorandum is filed) be denied.[5]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

OCTOBER 1965.

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[5] In view of the district court's disposition of petitioner's complaints, it was unnecessary for respondents to establish that, in any event, their acts were performed within the scope of their authority and in the pursuance of their official duties, within the meaning of *Barr* v. *Matteo*, 360 U.S. 564.

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